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Supreme Court, U.S.
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No. 01-769

IN THE

Supreme Court of the United States

EDWARD R. DONNELLY,

Petitioner,

—v.—

JEHAN ABDUR RAHEEM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. The petition presents the question whether a defendant is constitutionally entitled to rely on trial testimony to challenge a pretrial suppression ruling. However, as we explain in this brief, that question is not in fact presented by this case.

2. Whether the court of appeals applied an improper legal standard in rejecting the district court's affirmance of the state courts' holding that evidence of eyewitness identification from a suggestive lineup was nonetheless admissible because the lineup was only inadvertently suggestive.

RULE 14.1 STATEMENT

The parties in the Second Circuit were Jehan Abdur Raheem and Walter R. Kelly, Superintendent of Attica Correctional Facility. Edward R. Donnelly, Superintendent of Wende Correctional Facility, the state prison in which Mr. Raheem is presently incarcerated, has been substituted for Mr. Kelly as petitioner in this Court. Mr. Raheem is respondent in this Court.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Petitioner's first claim — whether the Second Circuit erred by relying on trial testimony to challenge a pretrial ruling denying a motion to suppress evidence — raises an issue that was neither presented to, nor addressed by, the Second Circuit. Moreover, petitioner purports to identify a conflict among the federal courts of appeals and state courts of last resort with respect to consideration of trial testimony in challenges to pretrial suppression rulings on *direct appeal*, which — even if it does exist — would not affect the Second Circuit's reversal of the district court's denial of respondent's federal habeas corpus petition.

Petitioner's second claim — whether the Second Circuit erred by failing to apply the appropriate standard of review — seeks pure error correction. Petitioner makes no attempt whatsoever to argue that there is any conflict among the circuits with respect to the Second Circuit's alleged failure to apply the § 2254(d) standard of review in this case. Accordingly, because this Court does not sit to issue advisory opinions nor to engage in error correction, the petition for certiorari should be denied.

STATEMENT

A. Factual Background

In January 1976, three men entered the Moulin Rouge bar in Brooklyn, New York. As the bar's patrons watched the Superbowl on television, one of the three men fatally shot Charles Hill. The three men then cleaned out the cash register, robbed several patrons, and fled the scene. When the police arrived several minutes later, the patrons described the shooter as a black male wearing a black leather jacket.

Three weeks later, the police conducted a lineup at the police station. At the time, the police suspected Lindsey Webb,

whom a confidential informant had identified as the gunman. Respondent Jehan Abdur Raheem was not a suspect at the time. Nevertheless, to fill out the lineup, the police inserted Raheem, who happened to be in custody on an unrelated charge. Critically, Raheem was the only member of the lineup wearing a black leather jacket. Three witnesses from the bar viewed the lineup. The bartender, Cecilia Dukes, could not identify any of the men as the shooter. The other two witnesses (two patrons, Arthur Shiloh and Vincent Cooke) identified Raheem, although Shiloh did so only after viewing the lineup a second time.

A month after the lineup, Detective Clarence Crabb interrogated Raheem. Although Raheem was represented by counsel on another matter, Detective Crabb did not inform Raheem's counsel of his intention to interrogate Raheem about the Hill murder. According to Detective Crabb's uncorroborated account of the ensuing interrogation, Raheem confessed to the Hill murder.

1. As the Second Circuit explicitly recognized, the essential facts were undisputed on appeal. Pet. App. 3a. The state trial judge made the following findings of fact, which, as the federal district court noted, are presumptively correct under 28 U.S.C. § 2254(e)(1):

- "Shiloh stated that he made his identification from the face, but it was the black leather coat that convinced him it was the defendant" (Pet. App. 53a (quoting pretrial suppression hearing conducted pursuant to *United States* v. *Wade*, 388 U.S. 218 (1967));
- Cooke "made the identification from his eyes and round face as well as a black leather coat" (*Ibid.* (quoting *Wade* hearing)).

And, as the Second Circuit remarked:

> [E]ven the state trial court, which declined to suppress the identifications by Cooke and Shiloh, found that Cooke "stated that he made the identification from [Raheem's] eyes and round face[] *as well as a black leather coat*," and that "Shiloh stated that he made his identification from the face, but *it was the black leather coat that convinced him it was the defendant*, the number one person, who was there at the time."

Id. at 27a (quoting *Wade* hearing testimony) (emphasis in original). "At trial, the identification testimony of Cook and Shiloh * * * was substantially the same as their testimony at the pretrial [*Wade*] hearings." *Id.* at 50a. Moreover, the factual underpinnings of the witnesses' testimony — whether pretrial or at trial — were not disputed issues addressed by either the federal district court or the Second Circuit, both of which determined that the lineup was suggestive.

2. Petitioner attempts to introduce one disputed "fact" before this Court, characterizing Raheem as "a man who confessed to the killing." Pet. 24; see also *id.* at 7. This is wholly inappropriate in light of the fact that the Second Circuit not only noted, consistent with the state appellate court's determination (Pet. App. 110a-112a), that the confession evidence was inadmissible (*id.* at 37a), but also cast substantial doubt on the confession as described by Detective Crabb:

> Crabb, the only witness to that conversation, did not call in a stenographer or another officer, did not ask Raheem to write out his confession, and did not ask Raheem to review or initial Crabb's notes.

Id. at 37a. Moreover, petitioner does not even attempt to explain the relevance of this alleged fact to the questions presented for review.[1]

B. Proceedings Below

Tellingly absent from the State's petition is a succinct summary of the issues actually raised before the state and federal courts. As a careful review of the actual state court factual findings and federal court legal determinations demonstrates, neither of the questions presented by the State merits this Court's review.

1. With respect to the pretrial lineup from which Cooke and Shiloh identified Raheem, the state hearing judge concluded:

- "[the lineup] wasn't for the purpose of identifying the defendant" (*Id.* at 50a (quoting *Wade* hearing)); and
- "there was no testimony whatsoever * * * where anybody suggested or made any undue suggestions to any of the persons who viewed the lineup" (*Ibid.*).

Accordingly, the state judge decided to admit the identification evidence on the ground that the lineup was not purposefully suggestive.

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[1] The State's gratuitous averment to the supposed confession seems calculated to suggest that the granting of the habeas petition in this case would unleash an allegedly confessed murderer onto society. In fact, however, any such suggestion is not only inappropriate but demonstrably false because, as the Second Circuit's decision makes clear, "Raheem is serving concurrent prison terms of 25 years to life on the basis of other convictions as well[; thus] the judgment in this case does not require his release." Pet. App. 40a.

2. At trial, the State introduced the testimony of Shiloh and Cooke. In addition, Detective Crabb testified that Raheem had confessed to the crime. The jury convicted Raheem.

3. On appeal, the Appellate Division reversed the conviction, ruling that Detective Crabb's testimony was inadmissible because the alleged confession had been obtained in violation of Raheem's constitutional right to counsel. *Id.* at 110a-112a. The court, however, affirmed the denial of the motion to suppress the identification on the ground that the lineup was not purposefully suggestive. *Id.* at 112a ("there is no evidence in the record to support a conclusion that the identification proceeding was not fairly conducted or that the identification of appellant as the perpetrator was suggestively induced"). The court remanded the case for a new trial. *Id.* at 113a.

4. At the second trial, Shiloh and Cooke again testified that Raheem was the gunman. Again, the jury convicted Raheem.

5. On appeal, the Appellate Division affirmed the conviction without discussing the constitutionality of the lineup. *Id.* at 114a-115a.

6. The New York Court of Appeals, in turn, declined to review the suggestiveness issue. *Id.* at 118a n.*. This Court denied certiorari. *Whitaker* v. *New York*, 474 U.S. 830 (1985).

7. On federal habeas review, the district court first concluded that the lineup was unduly suggestive. Pet. App. 53a ("The first question, then, is whether the line-up that included [Raheem] was suggestive. It was."). The court then concluded that, under the five factors outlined in *Neil* v. *Biggers*, 409 U.S. 188 (1972), the identifications were not independently reliable. Pet. App. 59a. In reaching these conclusions, the district court relied on both *Wade* and trial testimony. *Id.* at 53a-59a; page 10, *infra*.

Nonetheless, the court ruled that these witness identifications — which resulted from an unconstitutionally suggestive line-up procedure — were admissible under a newly fashioned "corroboration rule"; namely, in this case, Raheem's guilt was corroborated by other evidence that was inadmissible or not introduced at trial. Pet. App. 83a-85a. Specifically, the district court relied on "three sources of corroboration": (i) Raheem's confession (that was deemed inadmissible by the state appellate court); (ii) the fact that Raheem possessed a black leather coat; and (iii) evidence that Raheem had committed other murders in a similar fashion. *Id.* at 83a-84a.

The district court ruled in the alternative that "[t]he ground relied on by the trial judge for admitting the eyewitness identification [*i.e.*, 'the accidental nature of the suggestiveness'] is not 'contrary to,' nor does it involve an 'unreasonable application' of 'clearly established Federal law, as determined by the Supreme Court.'" *Id.* at 88a-89a.

8. Raheem raised both of these grounds on appeal: (1) whether the district court's proposed corroboration rule was constitutionally infirm; and (2) whether the state courts' reliance on the fact that the improperly suggestive lineup was not assembled with any suspicion of Raheem constitutes a misapplication of federal constitutional law. *Id.* at 19a-20a.

The Second Circuit reversed the judgment of the district court on each ground. *Id.* at 19a-38a. The court, rejecting the district court's proposed "corroboration rule," held that a court's assessment of an identification's reliability may not include consideration of unrelated evidence corroborating the defendant's guilt. *Id.* at 34a ("Even if we viewed these [three] items [of corroborative evidence noted by the district court] as reliable evidence of guilt, we would decline to adopt such an analysis, which we believe confuses the due process inquiry with harmless-error analysis."). This was the key issue litigated

by the parties and decided by the Second Circuit. Yet in its petition before this Court, the State has not challenged the soundness of this ruling, even in the face of the Second Circuit's intimation that the Circuits may be divided on this question. *Id.* at 35a.

Instead, the State challenges only the Second Circuit's rejection of the district court's alternative holding that sustained, as not "contrary to" federal law, the state courts' legal determination that "the accidental nature of the suggestiveness" of the lineup would salvage an otherwise unconstitutionally suggestive lineup. On this issue of law, the Second Circuit rejected the district court's (and state courts') position; in so doing, the court relied on clearly established federal law that the unintentional nature of the assemblage of a suggestive lineup is immaterial to the appropriate due process analysis governing the exclusion of identifications that result from suggestive police procedures. *Id.* at 28a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO REASON FOR THIS COURT TO ADDRESS WHETHER, IN A FEDERAL HABEAS CASE, A REVIEWING COURT MAY RELY ON TRIAL TESTIMONY TO CHALLENGE A PRETRIAL RULING DENYING A MOTION TO SUPPRESS EVIDENCE.

A. This Case Does Not Present An Appropriate Vehicle In Which To Address This Issue.

1. The Second Circuit Did Not Hold That A Defendant Has A Constitutional Right To Rely On Trial Testimony When Challenging A Pretrial Suppression Ruling.

Petitioner asserts that the Second Circuit "*effectively held*" that a defendant is "constitutionally entitled" to rely on trial

testimony when challenging a pretrial suppression ruling. Pet. 11 (emphasis added). See also *id.* at 13 n.2 ("the Second Circuit's reliance on trial testimony as a basis for overturning the pretrial suppression ruling necessarily rests on a holding that consideration of that testimony is constitutionally required"). The Second Circuit did not make such a holding.

To begin, the Second Circuit found, *consistent with both the federal district court and the state hearing court findings* (see pages 2-3, 5, *supra*) that the lineup was suggestive. Pet. App. 25a ("as the district court found and as the description * * * of the record of the state-court proceedings demonstrates, the lineup in which Raheem appeared in his black leather coat was plainly suggestive to Cooke and Shiloh").[2] Moreover, and significant in light of the State's argument, both the Second Circuit's description of the state-court proceedings as well as its analysis of the lineup's suggestiveness rely almost exclusively on citations to the pretrial *Wade* hearing transcript. See Pet. App. 6a-9a; *id.* at 26a-27a.[3]

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[2] It is long established that this Court will not lightly overturn concurrent findings of two lower federal courts (see *Hunt* v. *Cromartie*, 532 U.S. 234, 121 S. Ct. 1452, 1458-59 (2001)), and in particular consistent findings of lineup suggestiveness (see *Neil* v. *Biggers*, 409 U.S. 188, 193 n.3 (1972)). Therefore, as the case comes to this Court, it must be assumed that the lineup was constitutionally infirm.

[3] The few passing references to trial testimony are, for the most part, entirely redundant of the *Wade* testimony on the issue of the impact of the black leather coat on Cooke's and Shiloh's identifications, see, *e.g.*, Pet. App. 5a (quoting *Wade* hearing testimony with a "*see also*" reference to Second Trial Tr.); *id.* at 26a (same). Indeed, the only "standalone" references to trial testimony tend to support the *State's* position that Cooke and Shiloh relied upon factors other than the black leather coat in making their respective identifications. See *id.* at 5a (reference to Cooke's trial testimony that the shooter was

The State's contention before the Second Circuit was that the lineup was not suggestive because the goal was to present persons whose appearances were similar to that of Webb, the man whom the police had arrested as their suspect. See *id.* at 27a-28a; Brief of Appellee 31-32. The Second Circuit rejected this argument as "wide of the mark" (Pet. App. 28a), concluding that "[a]s to [Cooke and Shiloh], the appearance of Raheem as the only participant in the lineup wearing such a coat was unnecessarily suggestive" (*id.* at 28a-29a).

The State also urged the Second Circuit to adopt the district court's "corroboration rule." See *id.* at 34a; Brief of Appellee at 40-41. The court of appeals rejected the district court's new rule, concluding that "evidence of record that is unrelated to an identification but that is supportive of a finding of guilt is properly considered in harmless-error analysis, not in the due process inquiry of whether the identification has reliability." Pet. App. 36a. Thus, the Second Circuit concluded — without challenge by the State here — that the district judge had applied an erroneous legal standard in denying habeas relief and that there were no other legitimate grounds for denying that relief.

In making these two holdings, it was not necessary for the Second Circuit to rely on trial testimony. Indeed, petitioner has made no attempt to demonstrate that either of these holdings would be different absent any of the trial testimony citations.[4]

"medium size" and appeared to be in his 20s); *id.* at 26a (reference to Shiloh's trial testimony pointing to Raheem's "face and his black leather coat").

[4] In particular, to evaluate whether the identifications of Raheem by Cooke and Shiloh had reliability independent of the suggestive lineup, the Second Circuit evaluated the *Biggers* factors, relying on both *Wade* hearing testimony and trial testimony. Once again, for the most part, the court's references to trial testimony are interspersed among a far greater number of references to the *Wade* hearing

2. Petitioner Did Not Raise This Issue Below.

Significantly, the district court likewise relied on both *Wade* hearing and trial testimony — absent any objection on the part of the State — with respect to the fact that "[a]ll the witnesses noticed that the shooter was wearing a black leather coat, and gave that description to the police." *Id.* at 44a. The district court also cited trial testimony in its evaluation of the "opportunity to view"[2] (see *id.* at 54a-55a) and "degree of attention" factors (see *id.* at 57a). The district court concluded that "[c]onsidering these factors alone, the identifications simply do not appear solid enough to outweigh 'the corrupting effect of the suggestive identification itself,' especially given that both witnesses acknowledged that the suggestive coat was a factor in their identifications." *Id.* at 59a (citation omitted).

Although Raheem cited trial testimony in his habeas petition to the district court (see Petitioner's Memorandum of Law in Support of Petition for a Writ of Habeas Corpus 18-20 (July 31, 1996)), the State raised no objection to Raheem's

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testimony. See, *e.g.*, Pet. App. 31a, 32a. With respect to two references to trial testimony in its consideration of the witnesses' opportunity to view the shooter (see Pet. 18), the State cannot argue any prejudice since the court concluded that "[t]he opportunity factor, on balance, seems to favor reliability." Pet. App. 30a. Indeed, the sole factor on which the court seemed to place any significant reliance on trial testimony was the witnesses' degree of attention. See *ibid.*

But even more significantly, it cannot be said that the Second Circuit relied exclusively or even definitively on any one of the *Biggers* factors. Rather, the court considered "the poor ratings of Cooke and Shiloh on *most* of the * * * *Biggers* factors" (*id.* at 33a (emphasis added)) along with "the totality of the circumstances" (*ibid.*) and, significantly, the undisputed fact that "both witnesses repeatedly cited the coat worn by Raheem as influential in their selection of him" (*ibid.*).

reliance on this testimony either in its written response (see Affidavit in Opposition to Petition for a Writ of Habeas Corpus (Nov. 13, 1996)) or during the September 18, 1997 hearing before the district judge (see 9/18/97 Habeas Tr.). Nor did the State object when, during a subsequent hearing on August 3, 1999, Raheem again specifically referred to trial testimony on the record to cast doubt on the validity of the pretrial identification testimony. See 8/03/99 Habeas Tr. 42-43. Nor did the State raise any objection to Raheem's reliance on trial testimony in his October 8, 1999 letter-brief to the district court.

Not only did the State not object to Raheem's reference to trial testimony before the district court, the State actually encouraged the district court to rely on trial testimony by repeatedly referring to such testimony itself, without asserting any kind of qualification.[5] The State also stood silent during the habeas hearing when Raheem's counsel agreed with the district judge that "[t]he district court obviously has the power * * * to expand the record on habeas." 11/07/99 Habeas Tr. 12.

In light of the State's repeated failure to object to Raheem's reliance on trial testimony in his habeas petition or during oral arguments during the various hearings, the State's charge that the Second Circuit's decision "has the paradoxical effect of allowing a federal court to overturn a state court's pretrial suppression ruling on a ground that, according to New York precedent, the state appellate courts were barred from considering" (Pet. 14) rings especially hollow. For even if New

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[5] For example, the State specifically compiled a summary of the *Wade* hearing and trial testimony of both Shiloh and Cooke for the Court's consideration of the suggestiveness of the lineup procedure. See 9/18/97 Habeas Tr. 16. See also 11/07/99 Habeas Tr. 20-22 (State relies heavily on trial testimony in support of its opposition to Raheem's habeas petition).

York has a "well settled" procedural bar rule, precluding defendants who have not moved to reopen their suppression hearings from relying on trial testimony to challenge the suppression ruling, the State has waived any such alleged state procedural default rule. See, *e.g.*, *Lawrence* v. *Armontrout*, 31 F.3d 662, 666 (8th Cir. 1994) ("[o]ur circuit has joined other circuits in holding that the State must raise procedural bar issues, or they are waived"); *Fagan* v. *Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991); *Mayo* v. *Lynaugh*, 893 F.2d 683, 686 (5th Cir. 1990); *United States ex rel. Hindi* v. *Warden of McHenry County Jail*, 82 F. Supp.2d 879, 883 (N.D. Ill. 2000). Moreover, unless the district court has addressed the issue of procedural default, the issue is not appealable. See *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976).

Perhaps in recognition of the fact that a litigant who fails to present an argument to the district court cannot rely on that argument in the court of appeals, the State did not press this issue before the Second Circuit. As the State concedes in a footnote of its petition to this Court, its sole reference to the issue of whether a defendant may rely on trial testimony to challenge a pretrial suppression ruling was contained in a footnote of its brief to the Second Circuit. See Pet. 18 n.3 (citing Brief of Appellee 35 n.4).[6] Such a footnote reference in an appellate brief is insufficient to preserve an argument for appeal. See *Norton* v. *Sam's Club*, 145 F.3d 114, 117 (2d Cir.

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[6] The footnote reference, moreover, was limited to the single objection to the district court's crediting of a witness' trial testimony that none of the perpetrators came back to the bathroom, which was inconsistent with Cooke's *Wade* hearing testimony that he saw the gunman again at the bathroom door. See Brief of Appellee 35 n.4. As we discuss above (see pp. 9-10 n.4, *supra*), reliance upon this trial testimony, which is relevant to the "opportunity to view" factor, could not possibly have prejudiced the State, as the Second Circuit found in favor of the State on this factor.

1998) ("an argument made only in a footnote was inadequately raised for appellate review") (citation omitted); *United States* v. *Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993) (an argument that was initially presented only in a footnote of appellant's brief was inadequately raised for appellate review); *Hunter* v. *Allis-Chalmers Corp.*, 797 F.2d 1417, 1430 (7th Cir. 1986) (rejecting appellant's attempts to raise an issue presented in a footnote of his brief). See also *Williams* v. *Shalala*, 997 F.2d 1494, 1501 (D.C. Cir. 1993) (refusing to rule on an issue referenced in a footnote but not ruled on by the district court); *Banks* v. *Rockwell Int'l N. Am. Aircraft Operations*, 855 F.2d 324, 326 (6th Cir. 1988) (refusing to review an argument that was not adequately presented in the district court).

* * *

This Court "do[es] not decide questions neither raised nor resolved below." *Glover* v. *United States*, 531 U.S. 198, 205 (2001). See also *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below"); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]") (citation omitted). Accordingly, the petition should be denied.

B. There Is No Conflict In The Lower Courts On This Issue.

There is no circuit conflict on the issue of using trial testimony to challenge a pretrial suppression ruling on federal habeas review. Even if the Second Circuit had addressed the issue — which, as we discuss above, it did not — its holding would not establish the circuit split alleged by petitioner, which focuses on courts' review of suppression rulings on *direct appeal*. See Pet. 11-13; see also *id.* at 16. Petitioner makes no attempt to explain its assertion that the Second Circuit's

"effective[]" holding in the habeas case before it pertains to claims "*either* on appeal *or* on federal habeas corpus review." *Id.* at 11 (emphasis added); see also *id.* at 15, 16.

In fact, the sole federal habeas review case cited by petitioner, *Holloway* v. *Wolff*, 482 F.2d 110 (8th Cir. 1973), is, as the petitioner acknowledges (see Pet. 12-13), in accord with the approach taken by the Second Circuit here. *Holloway* states explicitly that, in the federal habeas context, the court may consider trial evidence in determining whether the defendant's rights had been violated. 482 F.2d at 113 n.2. Indeed, typically the "record" reviewed on federal habeas includes such trial testimony, *irrespective* of whether the petitioner has made or renewed objections to the pretrial suppression hearing. See, *e.g.*, *Messer* v. *Roberts*, 74 F.3d 1009, 1017 (10th Cir. 1996) (relying on trial testimony in holding lineup identification was not necessarily suggestive); *Armstrong* v. *Young*, 34 F.3d 421, 428 (7th Cir. 1994) (relying on trial testimony to conclude that showup identifications of defendant by witness were reliable); *Dobbs* v. *Kemp*, 790 F.2d 1499, 1506 (11th Cir. 1986) (reviewing trial testimony to confirm reliability of identifications; petitioner made no objection at trial); *United States ex rel. Gibbs* v. *Vincent*, 524 F.2d 634, 638 (2d Cir. 1975) (court concluded "from the testimony at the suppression hearing and the testimony at the trial" that show-up identifications were not impermissibly suggestive; petitioner made no objection at trial). See also *Cikora* v. *Wainwright*, 661 F. Supp. 813, 817 (S.D. Fla. 1987) (relying on trial testimony of witnesses and the officer who showed the photo array to conclude identification was not impermissibly suggestive; petitioner's objection not renewed at trial), aff'd, 840 F.2d 893, 894-95 (11th Cir. 1988).

Consideration of trial testimony by the federal habeas court seems particularly appropriate in light of the fact that the *Biggers* test requires courts to look beyond the suggestiveness

of an identification to determine whether the identification was nonetheless independently reliable. Indeed, in *Biggers* itself, this Court considered trial testimony in applying its due process analysis and the five-factor test fashioned to establish independent reliability. See 409 U.S. at 193-200.

Petitioner has cited no authority to the contrary in the habeas context. Moreover, during the habeas proceedings before the district court (as discussed pages 10-11, *supra*), the State apparently acquiesced in the district court's reliance on trial testimony.

II. THE SECOND CIRCUIT APPLIED THE APPROPRIATE STANDARD OF REVIEW PURSUANT TO 28 U.S.C. § 2254(d).

Petitioner's second question presented not only seeks pure error correction but also is not raised by the Second Circuit's actual decision.

1. With respect to the district court's "alternative holding" — the sole ground challenged by the State before this Court (see page 7, *supra*), the Second Circuit properly focused (as did the district court) on whether the state appellate court's determination that the identifications were admissible because the suggestive lineup was not purposeful was "contrary to" federal law as required by 28 U.S.C. § 2254(d)(1).[7]

The State argues instead that "the state court finding that the identifications were reliable did not involve an 'unreasonable

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[7] Under § 2254(d)(1), a petitioner cannot obtain habeas corpus relief on a claim that the state courts have addressed on the merits unless the decision handed down by the last state court to consider the claim is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); see *Williams* v. *Taylor*, 529 U.S. 362 (2000).

application' of federal law." Pet. 24.[8] But the Second Circuit did not review the state courts' factual findings (see pages 2-3, *supra*) as to the lineup identifications of Raheem. Rather, the Second Circuit addressed the purely legal issue: whether "the state courts' reliance on the fact that the lineup was not assembled with any suspicion of Raheem *constitutes a misapplication of federal constitutional law*." Pet. App. 20a (emphasis added). The Second Circuit expressly agreed with Raheem's contention that it did. See *id.* at 20a, 27a-29a.

2. The State's charge that the Second Circuit "completely ignored" (Pet. 19) and "failed to apply" (*id.* at 20) § 2254(d) is baseless. While the court of appeals did not explicitly invoke the "contrary to" language of 28 U.S.C. § 2254(d)(1), a finding in that regard is necessarily implicit in the court's agreement with Raheem's contention on appeal, which was explicit on this point.[9]

In any event, the State offers no authority for the proposition that a court of appeals must explicitly invoke 28 U.S.C. § 2254(d). Not only are there other case examples to the contrary (see, *e.g.*, *Clark* v. *Caspari*, No. 00-1844, 2001 WL 1504718, at *2 (8th Cir. Mar. 15, 2001) (applying § 2254(d) without expressly stating the standard of review applicable

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[8] A state court decision is an "unreasonable application" of clearly established law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413.

[9] Raheem's argument that "[t]he state court ruling that the lineup did not violate due process because the police did not assemble it with the purpose of identifying petitioner is 'contrary to' clearly established federal law as determined by the Supreme Court" (Brief of Appellant at 54-57) focused explicitly on the proper application of 28 U.S.C. § 2254(d)(1).

thereunder)), but it would be a particularly odd requirement in a case, such as this, where neither side contested the standard's applicability.[10]

3. Moreover, the Second Circuit's decision that the state court's reliance on the inadvertence of the suggestiveness of the lineup constituted a misapplication of federal constitutional law (see Pet. App. 20a, 27a-29a) is plainly correct. A state court decision is "contrary to" clearly established law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams* v. *Taylor*, 529 U.S. 362, 413 (2000).

As the Second Circuit recognized, this Court has explicitly recognized that the "question of whether the police procedures constituted misconduct is not determinative of whether an identification was suggestive." Pet. App. 28a (citing *Manson* v. *Brathwaite*, 432 U.S. 98, 112-14 (1977)). Thus, the Second Circuit concluded that:

> [t]o the extent that the State means to emphasize that its assemblage of a lineup that was suggestive as to Raheem was unintentional, that argument is immaterial. The purpose of excluding identifications that result from suggestive police procedures is not deterrence but rather the reduction of the likelihood of mis-identification.

Pet. App. 28a. See *Biggers*, 409 U.S. at 198 ("it is the risk of misidentification created by a suggestive pretrial identification, not the deterrence of police misconduct, that undergirds the

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[10] The State mentions that it argued in the Second Circuit that § 2254(d)(1) applied to the case (Pet. 20-21), but neglects to mention that Raheem did as well (see Brief of Appellant at 54-57).

exclusion of tainted identification testimony"); *Wade*, 388 U.S. at 229 ("[s]uggestion can be created intentionally or unintentionally in many subtle ways"). See also *Thigpen* v. *Cory*, 804 F.2d 893, 895-96 (6th Cir. 1986) (government misconduct irrelevant; "only the effects of, rather than the causes for, pre-identification encounters should be determinative of whether the confrontations were unduly suggestive"); *Green* v. *Loggins*, 614 F.2d 219, 222 (9th Cir. 1980) (an identification may prove unreliable, and therefore inadmissible, even though the identification "has not involved any culpable police conduct"). Petitioner has cited no authority that the state courts' reliance on the inadvertent suggestiveness of the lineup is not contrary to clearly established federal law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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